ments of error which squarely raised the point that the plaintiff, although she had shown failure to complete the building, had failed to show that it was by reason of default on the part of the principal.

So considered I find that the bond in this case was an absolute undertaking by the defendant directly to the plaintiff that the houses would be completed according to plans and specifications identified by reference to the operation agreement, that it was intended solely to secure the plaintiff's loan and was not intended to and did not guarantee full performance of the operation agreement, that it was not intended to and did not confer any rights (except contingently on full payment to the plaintiff) upon Equitable or its subsidiary, that the plaintiff was the real obligee and that no default on the part of the nominal obligees would affect the plaintiff's rights.

Therefore, it is wholly immaterial whether or not default on the part of Equitable or its subsidiary excused the builder from his obligation under the operation agreement. The plaintiff having acquired its right against the surety, not derivatively by assignment from Equitable but directly by virtue of its advances of money on the faith of the note, mortgages and bond, it is also immaterial that Equitable's subsidiary did not join in the assignment and its default (even if that could be considered its separate act) is no defense.

The third defense if supportable at all must be upon the theory that the surety bond was given solely as collateral security for the assigned mortgages. Again, I am unable to take the defendant's view of the transaction. The mortgages were pledges; the bond was collateral security in the broad sense of an obligation running alongside of the principal debt, according to the derivational meaning of the word "collateral." Both were given to secure the loan. On default, the bank had the right to look to all the collateral which it held or to any of it. Jennings v. Loeffler, 184 Pa. 318; Adelphia B. & L. Assn. v. Trilling, 121 Pa. Sup.

469; Stoflet v. Kress, 342 Pa. 332. The sale of the mortgages exhausted the plaintiff's rights against that particular group of collaterals and what happened to the mortgages thereafter, whether they were paid or released or satisfied, made no difference. But it did not carry the plaintiff's rights in the bond nor divest the plaintiff of its right to enforce the defendant's obligation to make good the loss. This result could have followed only if the bond had been given solely as collateral for the mortgages, and it would need evidence of a very different kind of transaction from that appearing here to compel that finding.

The argument that the renewal of the notes released the surety is fully met by the rule of Philadelphia to Use v. Fidelity and Deposit Co. of Maryland, 231 Pa. 208; Trustees of Methodist Episcopal Church of Franklin v. Equitable Surety Co., 269 Pa. 411, and other cases, holding that a paid surety will be relieved only if the extension or alteration in the terms of the contract is material and work to its disadvantage. There is nothing in the present case to show that the defendant incurred any detriment by reason of the notes having been renewed, and as a matter of fact, nothing to show that it suffered any loss by reason of the mortgages' sale, assignment and foreclosure.

In addition to the foregoing, the assertion of this (third) defense is plainly an attempt by the defendant to "mend its hold." "Where a party gives a reason for his conduct and decision touching anything in controversy, he is estopped, after litigation has begun, from changing his ground and putting his conduct upon another and different consideration," Railway Co. v. McCarthy, 96 U. S. 258. Even before formal notice of default, the defendant repudiated and denied all liability with respect to the bond and the one and only reason advanced to justify its position in so doing was its first defense, already considered. It reasserted this position ("in accordance with our former correspondence") after it had

been notified by the plaintiff of its intention to sell the mortgage collateral at auction and after it had been advised of such sales of the Furman and Roehm mortgages and the Storck bonds. As late as February 26, 1943 the defendant filed its affidavit of defense on the merits with new matter and made no suggestion of this third defense.

The fourth defense is without merit. The measure of damages is the cost of completion (Purdy v. Massey, supra; Leonard's Estate, 343 Pa. 198). There is evidence of the estimated cost of the entire operation, including an intemized breakdown of the estimated cost of the buildings. This latter, taken in connection with the stipulation as to what had actually been done when work stopped, furnishes satisfactory evidence of so much of the cost as is applicable to the partial performance, from which the balance or cost of completing the unfinished job can be ascertained by simple subtraction.

The fifth defense was fully considered on the defendant's motion to dismiss and the conclusion reached that the record as then presented failed to show any evidence of abandonment of its cause of action by the plaintiff and that the history of the proceeding did not require an involuntary dismissal for want of prosecution. Discovery procedure taken by the defendant in preparation for trial has not produced any additional support for its position. Whether it intends to press this defense any further, I do not know, but no request raising it has been presented.

The defendant objected to the entire testimony of the plaintiff's vice-president "for the reason that it is our position that the transaction between the Provident and the Equitable is not relevant to the issue before your court." Having held in the foregoing opinion that the transaction was relevant, I overrule the objection. Later in the witness' testimony various other objections were interposed none of which have any substantial merit and they are overruled. The rule against leading questions

has long ago been relaxed to permit the Court to exercise a sound discretion, in the interest of expediting the proceedings and clarifying the testimony where, in the Court's judgment, it can be done without danger of falsehood.

The plaintiff's vice-president testified that, without the bond, the loan would not have been made. While this testimony was properly received, I may say that it is a fact which I would find from the circumstances, entirely independently of the testimony.

ANSWERS TO REQUESTS.

The stipulation of facts is adopted as the Court's special findings of fact. The view taken by the Court of the nature of the transaction involved in the case makes a number of facts stipulated immaterial and this also applies to a number of the defendant's requests. Such requests as are not covered by the facts as found above are held to be immaterial and are not answered. The statements of fact in the opinion may be taken as additional special findings, supplementing or modifying the facts as stipulated, and answering such requests as are not covered by the stipulation. The statements of law contained in the opinion may be taken as conclusions of law.

I affirm the plaintiff's requests for conclusions of law and deny the defendant's except the first which I affirm.

An order for judgment in accordance with the foregoing may be presented.

15272

Before (s) KIRKPATRICK, *J.*

This action was upon the bond in the Storck operation which, in point of time, was the earliest of the three. The only difference between this action and No. 15270 is the fact that in the Storck transaction the builder's

application to the defendant for the surety bond contains the question and answer, "To whom to be given?" "Provident Trust Co., Trustee."—a fact which makes the defendant's knowledge of the real nature of the transaction even plainer than in the other case.

The facts and legal principles stated in the opinion in Action No. 15270 may be taken as special findings and conclusions in this one. In addition I affirm the plaintiff's requests for findings of fact and conclusions of law. It is unnecessary to answer such of the defendant's requests for findings of fact as are not covered by the foregoing, the reasons stated in No. 15270 being applicable. I deny all the defendant's requests for conclusions of law except the first, sixteenth and seventeenth, which are affirmed.

An order for judgment for the plaintiff may be presented.

OPINION

OF THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 15270.

Sur Motion for New Trial.

Before KIRKPATRICK, *J.*

This case turned mainly upon the scope of the defendant's obligation—whether the bond was for the faithful performance of the building contract or for the completion of the houses, regardless of reasons or excuses for their non-completion. The court found that it was the latter kind of bond.

In reaching its conclusions the court examined the entire transaction and found that the bond was intended to run directly to the plaintiff to secure its loan, the plaintiff being the real obligee, that the building operation had been

undertaken by, or through the medium of, Equitable Bonded Mortgage Company and that Equitable, although on paper an obligee, was in reality and to the knowledge of the plaintiff in the position of a principal along with the building contractor (the nominal principal). The defendant's chief contention in this motion for a new trial is that this view of the transaction was a pure figment of the court's imagination without anything in the record to warrant it.

Ample evidence supporting the court's findings is to be found in the stipulation, testimony, and exhibits, which fully disclose the circumstances surrounding the transaction, the manner in which it was consummated, the relationships of the various parties to it and their common knowledge of the objects to be attained.

However, it is also worth noting that the defendant itself is on record in the case with an explicit avowal that the real, as distinguished from the apparent, relationship of the parties was what the court found it to be. In the affidavit, filed in support of a motion to dismiss the action for want of prosecution and expressly incorporated in the written motion presented by the defendant's counsel, the following appears, "The said principals designated in the said bonds were in fact only straw parties acting on behalf of the said obligees which controlled the actions and operations of the said principals and such method of operation by the obligees was or should have been known to the plaintiff herein at the time of the assignment of the said bonds by the said obligees to plaintiff herein." It is also alleged that certain witnesses, if living, would have testified "that the said operations were actually the operations of the obligees (Equitable) designated in the said bonds, that the contractors in whose names the applications for the surety completion bonds were submitted, were actually dummy contractors working for and on behalf of the said obligees;" etc. The court did not go quite so far as to characterize the contractors as dummies, but, otherwise, the foregoing quotations epitomize

the court's view of Equitable's position in the transaction, and could have been adopted, in hæc verba, as one of the findings.

Although the court did not have this affidavit in mind in making the findings, he might well have considered it, under general principles relating to judicial notice. See U. S. v. City of Philadelphia, C. C. A. (3), 140 F. 2d 406; Perlman v. 322 West Seventy-Second Street Co., Inc., 127 F. 2d 716. The motion was more than a mere procedural step. Upon the facts asserted in it the defendant sought to persuade the court to dismiss the whole cause. In view of what appears in it, it is pretty hard to see much force in the argument which the defendant now makes that the view which the court took was wholly unwarranted, unexpected and prejudicial.

None of the other reasons presented in support of the motion has enough substantial merit to call for the granting of a new trial.

The motion is denied.

Sur Motion to Amend Findings.

The court did not intend to disurb or modify the stipulated facts in any particular, and the findings appearing in the opinion do not have that effect. In order to avoid any misunderstanding which the defendant may have upon the point, the opinion is amended by striking out the word "stipulated" in the third line of the last page and substituting the words "separately found." One or two other minor changes in the opinion heretofore made by the court are confirmed. The court amends its affirmance of the plaintiff's second request for conclusions of law by allowing interest at 3 percent instead of 6 percent, in order to conform with the court's later memorandum sur motion for judgment.

Sur Motion to Amend Judgment.

The motion is denied.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 8846 and 8847 October Term, 1945

PROVIDENT TRUST COMPANY OF PHILADELPHIA, a Corporation of the Commonwealth of Pennsylvania

v.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a Corporation Existing Under the Laws of the State of New York,

Appellant

APPEALS FROM THE JUDGMENTS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 5, 1945
Before ALBERT LEE STEPHENS, MARIS and GOODRICH,
Circuit Judges.

OPINION OF THE COURT
(Filed December 17, 1945)

By GOODRICH, *Circuit Judge.*

This case arises on appeal from two District Court judgments,[1] against a surety on three completion bonds in the aggregate amount of $868,264.79. Both cases are factually alike and present identical questions of law.[2] The persons involved are: Provident Trust Company of Philadelphia, plaintiff; Metropolitan Casualty Insurance Company of New York, defendant; and Equitable Bonded Indemnity Company with its wholly owned subsidiary, Equitable Securities Corporation. From the business operations of the Equitable companies with certain builders, Furman, Roehm and Storck, and their surety, the defendant Metropolitan, on the one hand, and the plaintiff Provident on the other, the present conflict of interests arose.

The case is in Federal Court on diversity grounds only. All the operative facts seem to have had their setting in Pennsylvania. Under the now well understood and established rule, Pennsylvania law is to be applied and Pennsylvania decisions, so far as found to be applicable to the questions in the case are controlling.[3]

The defendant's principal and most important point, while presented with considerable elaboration, brings the case down to a simple set of facts which, in turn, is controlled by simple and well settled propositions of law. The substance of the case on the defendant's theory is this: A builder undertakes certain operations. In the

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[1] One judgment was for $457,012.31 representing the full amount of two unpaid loans less a credit of $300 plus 3% interest for a little over 15 years; the other judgment was for $411,252.48 representing the full amount of Debenture Bonds, less a credit of $200 plus 3% interest for more than 15 years.

[2] The purely nominal difference is that in one case, plaintiff sues in an individual capacity on two of the bonds, and in the other case, it sues as trustee on the remaining bond.

[3] The decision referred to by appellee as presenting a case (Baglin v. Title Guaranty Surety Co., 166 Fed. 356, affirmed, 178 Fed. 682 (C.C.A. 3, 1909)) "so nearly identical" was decided long before Erie R. Co. v. Tompkins was ever dreamed of. A Federal Court decision upon a question of state law settled upon principles of "general commercial law" is no precedent now.

language of suretyship, he is the principal debtor. He is to be supplied with money by a creditor, in this instance Equitable. A completion bond is given by the defendant surety. With the consent of the principal debtor and surety, rights of the creditor (Equitable) are assigned to plaintiff Provident Trust Company. The principal debtor's project is never completed because the creditor (Equitable) fails to advance the funds promised. This failure excuses the debtor from its performance.[4] Since the principal debtor is not in default upon his performance, his surety is likewise not in default. Therefore the creditor (Equitable) cannot recover against the surety.[5] Provident is but the assignee of the creditor and the rights of the assignee rise no higher than the assignor.[6] Judgment must, therefore, be for the defendant. If the defendant is right in its argument that the facts in the instant case are essentially those in the statement just made, it is perfectly clear that it is right in its legal conclusion. Indeed, the plaintiff would not claim to the contrary.

The plaintiff, however, claims and got the District

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[4] Restatement Contracts, § 274(1) "In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional." Pennsylvania Annotations § 274(1), in accord, cites a great variety of cases.

[5] Restatement Security § 126 "Where there is a promise for an agreed exchange between creditor and principal and there is a material failure of performance by the creditor not justified by the conduct of the principal, the surety is not liable to the creditor unless the principal has elected to treat the failure only as a partial breach." Pennsylvania Annotations § 126, *"Accord:* Gunnis v. Weigley, 114 Pa. 191, 6 A. 465 (1886)". See also: McShain v. Indemnity Insurance Company of North America, 338 Pa. 113, 12 A. (2d) 59 (1940); Young v. American Bonding Company, 228 Pa. 373, 77 A. 623 (1910).

[6] Restatement Contracts § 167(1) "An assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set offs are based on facts existing at the time of the assignment, or are based on facts arising thereafter prior to knowledge of the assignment by the obligor". Pennsylvania Annotations § 167(1) in accord, cites a number of cases.

Judge to go along with the claim, that it is not the assignee of a contract made by the defendant with Equitable but the contract is essentially one with the plaintiff itself. Its rights are not, therefore, derived by assignment from Equitable, but are obligations running directly from defendant to plaintiff. Of course, if this is the substance of the transaction, the view set out above has no application. There were no conflicts of testimony to be resolved at the trial. Most of the facts were stipulated and the testimony of the one witness, A. G. Scattergood, Vice-President of the plaintiff, was not disputed but relied on by the defendant. Our question becomes, therefore, what is the legal conclusion to be drawn from facts rather than what are the facts themselves.

Are the plaintiff's rights based on an obligation running directly to it or do they arise only by assignment from Equitable? Plaintiff contends,[7] and the District Court agreed, that Provident was a direct obligee. The facts upon which this conclusion is based are these: the surety knew that Provident and not Equitable was to be the ultimate recipient of the bonds;[8] the bonds, assignment and consent to assignment were bound together as though they were a single document;[9] the whole transaction was consummated in a single day (except for advances of money) so that Equitable was only a fleeting holder of the instruments which were immediately transferred to Provident; the assignment was executed and consented to even before the bonds were

[7] Plaintiff's theory is that the "primary purpose of the surety bonds was to protect Provident" and "the 'assignment' in the bonds was an 'assignment' in name only".

[8] The District Court points out that "* * * in the Storck transaction the builder's application to the defendant for the surety bond contains the question and answer, 'To whom to be given?' 'Provident Trust Co., Trustee'—a fact which makes the defendant's knowledge of the real nature of the transaction even plainer than in the other case." The Court adds, "The plaintiff's vice president testified that, without the bond, the loan would not have been made."

[9] The single document view rests on this in the District Court's own wording: "The bond and assignment, with a statement of the defendant's financial condition and a power of attorney authorizing the execution of the bond, were bound together and backed by a single office backer of the defendant."

delivered to Equitable;[10] and finally defendant's statement that the principals were straw men.[11] This we think is a fair summary of the points relied upon by plaintiff and sustained by the District Court to show an obligation direct to plaintiff.

But since we are here dealing with obligations arising out of words used by the parties, we had better give attention to the language they used, unless we are to put the cart before the horse. If that language is ambiguous, we may, of course, go behind it and examine the cartload of surrounding facts to try to find out what was meant. As might well be expected of large financial organizations skilled in their calling, and advised by able counsel, the language is clear and to the point. It is plainly the language of assignment. The bonds refer to Equitable and its subsidiary as "obligees". The assignments say that Equitable does "grant, bargain, sell, transfer, assign and set over" to Provident. They speak of the bond "so assigned" and of "this assignment" to Provident. They provide that if the mortgages be reassigned to Equitable, Provident will also "re-assign" its rights under the bond. Metropolitan and the builders state, "We hereby consent to the above assignment." The pleadings by Provident

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[10] This does not amount to a technical flaw in the assignment, however. For while the assignments and consents were executed before the bonds were delivered to Equitable, that delivery nonetheless preceded delivery of the assignments to Provident. Thus when the documents were handed to Equitable the bonds became effective by delivery and when "thereafter" as is stipulated, the documents were handed to Provident the assignment became effective by delivery. And in any event, even if the assignment had become effective before the bonds were delivered, the latter would still have been assignable as future interests. East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96 (1879); Ruple v. Bindley, 91 Pa. 296 (1879); Citizens Trust & Surety Co. v. Howell, 19 Pa. Super. 255 (1902).

[11] The District Court states, "In the affidavit, filed in support of a motion to dismiss the action for want of prosecution and expressly incorporated in the written motion presented by the defendant's counsel, the following appears, 'The said principals designated in the said bonds were in fact only straw parties acting on behalf of the said obligee which controlled the actions and operations of the said principals and such method of operation by the obligees was or should have been known to the plaintiff herein at the time of the assignment of the said bonds by the said obligees to the plaintiff herein'."

speak of defendant surety having "executed its written consent to a certain written assignment" to plaintiff. It is further expressly stipulated that Metropolitan as surety and the builders as principals, "executed their written consent to a certain written assignment to Provident." And the plaintiff sues as assignee of a contract, not one praying for reformation of an instrument. This is clear, exact, accurate. Neither we nor Judge Learned Hand's twenty bishops could change its plain meaning.[12] We have no case of mistake here, nor reliance by one party on the superior skill or knowledge of the other, no dominant bargaining agency which has imposed its will on a weaker party by hiding the real nature of the transaction through language formed to its own advantage,[13] nor any other possible reason for disregarding a simple meaning clearly expressed.

Furthermore, we do not see that the various facts urged by the plaintiff to show that Provident was a direct

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[12] Judge Learned Hand in Hotchkiss v. National City Bank of New York, 200 Fed. 287, affirmed 231 U. S. 50 (1913): "A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there was some mutual mistake, or something else of the sort."

[13] The District Court states, "But even where language is plain and unambiguous, there are many situations in which circumstances may be resorted to to show that a transaction is, in reality, something entirely different from what it appears to be." It cites as examples that a clause for "liquidated damages may be shown to be a penalty"; a "transfer, absolute on its face, may be shown to have been given for security only"; and a purported bailment lease shown to be a conditional sale. In all these instances courts cut through the transaction as the parties have written it. The purpose of forbidding a clog upon the equity of redemption is of course to protect a debtor against a dominant creditor. In the liquidated damage case there is the same element of public policy present plus the point that when parties are allowed to stipulate for damages at all they are, to some extent, substituting their own rules for those of the law. Obviously this is a privilege to be kept within limits. All these exceptions are inapplicable here, for this is but an ordinary bargain between strong and well advised business concerns. So long as they stay within the law they may deal as they please and neither needs the guardianship of a court.

obligee prove the conclusion. It was quite probable that Provident considered itself sufficiently protected as an assignee. The testimony of its vice president showed the company sometimes took obligations running directly to it. We have no doubt that in fact its officers knew the difference. We think the binding of all papers together is not a legally significant fact nor is the length of time Equitable held them before handing them over to Provident. The matter of the affidavit referred to above does not come within what has been said. It should be noted however that this was filed at an early stage in the proceedings among matters "intended to be proved" by defendant. It was before the answer and before the stipulations the parties entered into. We think it has no significance. Further, except for mutual mistake and reformation, the rule that contracts mean what they clearly say applies to both contracting parties.

There is one more problem which requires consideration. The plaintiff claims that the surety's obligation was an absolute one. It points out that the language of the condition of the bond is that "The buildings hereinbefore mentioned shall be fully constructed and completed in accordance with the plans and specifications above referred to." This, it says, is an absolute and unconditional promise to see that completion is accomplished. In Purdy v. Massey, 306 Pa. 288 (1932) the Supreme Court of Pennsylvania was discussing language in a completion bond and its problem was whether the language used by the surety constituted the promisor a guarantor or whether the promise was merely to indemnify. The court concluded that the language was an affirmative covenant to "complete the building in the event of default by the principal". It was found that there was default by the principal and the surety was held. But the court was not holding the surety as anything more than a guarantor of performance by the principal debtor.

Of course, it is possible for a surety to contract that

a thing will happen or that a given result shall be produced. We think it likely that ordinarily surety bonds are not so given because the ordinary concept of suretyship is that of one person backing up the performance of another.[14] The question is whether this particular bond, in the language quoted, creates a promise on the part of the defendant regardless of the default of anyone else. The surety company relies upon the Pennsylvania decision of Young v. American Bonding Company, 228 Pa. 373, 77 A. 623 (1910). The plaintiff strenuously urges that this case is not in point and the District Court was led to agree with it.[15] If the Young case is in point we think it establishes the proposition that the words used in this type of bond which, in turn, contains a reference to a contract, makes performance of the surety's promise conditioned upon the non-performance of the main contract by the principal debtor. If this case is in point it obviously governs us because, as stated above, the instant case is to be settled in accordance with Pennsylvania law. We quite realize that it is part of a mature system of law to make distinctions. Only an exceedingly primitive legal culture is unable, for instance, to distinguish between intentional killing and death through accident. But it is not part of a mature system of law to make distinctions without differences. We cannot see, upon this point, any difference between the American Bonding case and this one. We think the former decision controls. The conclusion of that control is that the defendant's liability was conditioned upon a default by the principal obligor, that is the builder. The builder was not in default because

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[14] See Restatement Security § 82 and Comment thereto.

[15] The District Court says it does not think the Young case rules because: "The difference in the wording of the conditions of the two bonds may be noted. It is slight but not entirely without signfiicance. In the Young case the condition was, 'if the said principals shall well and faithfully construct and complete . . .'. In the present case the condition is, 'That if the buildings hereinabove mentioned shall be fully constructed and completed . . .'." The Court goes on to point out that the subsidiary facts of the Young case and the instant case are also "fundamentally entirely different".

he had an excuse for non-performance. Neither is the surety.

This analysis of the case makes it unnecessary for us to consider the other arguments made by the defendant.

The judgments of the District Court are reversed.